***THE HON'BLE SRI JUSTICE P.S.NARAYANA**

+ WRIT PETITION NO.22274 OF 2007

% 11-12-2007

Between:
A.Sudhaker Reddy

….Petitioner

A N D

South Central Railway and
Three others

…Respondents

! Counsel for the Petitioner: Mr.P.Venugopal
^ Counsel for Respondents 1 to 3: Mr.P.Ganga Rami Reddy
^ Counsel for Respondent No.4: Mr.Prasad Rao Vemulapalli

< Gist:

> Head Note:

? CITATIONS:
(2005) 6 Supreme Court Cases 138

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O R D E R:

This Court ordered notice before admission on 22-10-2007 and directed status quo to be maintained for a period of two weeks in WPMP No.28889 of 2007. The interim order is being extended from time to time. WPMP No.31427 of 2007 is filed to implead respondent No.4 and by order dated 22-11-2007, the said application was ordered and respondent No.4 was impleaded as a party.

2. The petitioner filed the present writ petition for a Writ of Mandamus declaring the action of the respondents in highhandedly finalizing the contract namely "construction of new office building for Chief Administrative Officer, Construction, South Central Railway at Secunderabad including development of circulating area, vehicle parking etc" in pursuance of tender notice No.37/CAO/C/SC/2007, dated 27-06-2007 ignoring the petitioner and not calling the petitioner for negotiation like it was done to the other tenderer, as being illegal, arbitrary and hence violative of Article 14 of the Constitution of India.

3. Sri P.Venugopal, learned counsel representing the petitioner, had taken this Court through the contents of the affidavit filed in support of the writ petition, the stand taken in the counter-affidavit and also the contents of the reply-affidavit and would maintain that though the eligibility criteria specified in the tender notice has been fully satisfied by the petitioner, the petitioner was not called for negotiation. The learned counsel also had pointed out to the tender notice and further made an attempt to demonstrate how the petitioner would fully satisfy the eligibility criteria of the tender notice as required by the respondent-Railways. The learned counsel would submit that though the petitioner satisfies the eligibility criteria, the action of respondents 1 to 3 in trying to finalize the contract ignoring the petitioner and not calling the petitioner for negotiation is arbitrary, discriminatory and the same is violative of Article 14 of the Constitution of India and hence the petitioner is bound to succeed.

4. Sri Gangi Ram Reddy, the learned Standing Counsel representing respondents 1 to 3, had taken this Court through the contents of the counter-affidavit and would maintain that on careful verification, the authorities were satisfied that the petitioner does not satisfy the eligibility criteria. The learned Standing Counsel had taken this Court through the contents of the counter-affidavit and further placed strong reliance on the decision of the apex Court in **Master Marine Services (P) Ltd v.Metcalfe & Hodgkinson (P) Ltd and another**[1].

5. Sri Prasad Rao Vemulapalli, the learned counsel representing respondent No.4, substantially had taken the same stand as that of respondents 1 to 3.

6. Heard the counsel on record and perused the material available on record.

7. It is stated in the affidavit filed in support of the writ petition that the petitioner is a qualified Engineer who studied in India as well as Abroad and he had registered himself as Special Class Civil Contractor with the Government of Andhra Pradesh and has been executing several civil works for the State of Andhra Pradesh and other instrumental agencies of the State as well as the Central Government for the past 15 years. The South Central Railway called for a tender and in fact they posted the said tender notice even in their website. Any person who is interested in participating in the tender as per their notification so posted in the website have to download the tender schedule. Accordingly, the petitioner downloaded the said tender schedule of the tender notice bearing No.37/CAO/C/SC/2007, dated 27-06-2007. A copy of the same had been placed before this Court. It is further stated that the said tender was called for construction of new office building for Chief Administrative Officer, South Central Railway at Secunderabad including development of circulating area, vehicle parking etc. As per the notification, the last date for submitting the tenders was 31-07-2007 at 11.00 a.m. Incidentally, the eligibility criteria/credentials were also mentioned in the said tender. The said condition of the tender requiring eligibility criteria is-

"….2.1 The tenderer (s) should have completed at least one similar single work viz.,

buildings above G+1 for a minimum value of 35% of advertised tender value of the work in the last 3 financial years…..".

Further it is stated that the petitioner and one Sri M.V.V.Satyanarayana, who was subsequently impleaded as party respondent as referred to supra, only participated in the said tender. Further it is stated that the petitioner satisfies the eligibility criteria having constructed two-storied commercial complex in the premises of old civil hospital, situated at old N.H.9, Suryapet, Nalgonda district consisting of super structure for ground floor, first floor and terrace floor. The petitioner enclosed a copy of the experience certificate in respect of the said work done by him along with the tender schedule. Further, it is averred that the petitioner quoted the price at Rs.6,22,85,882-42 ps, whereas the other person who had participated in the said tender, i.e. respondent No.4 had quoted the price at Rs.6,25,34,573-84. The petitioner was informed that the other tenderer i.e. respondent No.4 had been called for negotiations by respondents 1 to 3, but till today the petitioner was not called for any negotiations. It is needless to mention that the South Central Railway has to act fairly reasonably and every act of it has to be transparent. It cannot single out persons by inviting only one of the tenderers for negotiation and depriving the petitioner of the said opportunity. This is, *per se*, bad in law and hence violative of Article 14 of the Constitution of India. It is further stated that the respondents had also stated orally to the petitioner that the petitioner did not fit in the eligibility criteria since the certificate produced by him shows that he had constructed a two-storied building, but whereas the other tenderer Sri M.V.V.Satyanaraya had constructed ground plus two floors. Ground plus two floors was not at all a term in the tender. It is further averred that the respondents cannot read something which would favour somebody and which is not the subject matter or "term" of the tender. This itself shows that somehow or the other, the respondents want to favour the said individual. No doubt till today, the contract was not awarded to anybody. Further it is averred that the petitioner also should have been called for negotiation like the other tenderer-respondent No.4. Further it is averred that the term of tender cannot be interpreted in such a fashion so as to suit some other person and hence such action would suffer from the vice of non-application of mind and also violative of Article 14 of the Constitution of India. In such circumstances, the petitioner being left with no other option approached this Court praying for appropriate reliefs specified supra.

8. In the counter-affidavit filed by respondents 1 to 3 it is averred in para 2 that to have a permanent office building for Chief Administrative Officer (Construction), South Central Railway, Secunderabad, open tenders were called for vide tender notice NO.37/CAO/C/SC/2007, dated 27-06-2007 for construction of the said building including development of circulating area, vehicle parking etc. The tender notice was published in all the leading newspapers and to have more publicity, the tender notice was also kept in website with due date for submission of tender, opening on 31-07-2007. When the tender box

was opened on 31-07-2007 at 11.30 hours it is found that only two offers were received from the following tenderers. The total value of the work as quoted by the tenderers is furnished against the name of the tenderers.

Sl. No.	Name and address of the tenderer	Total value of the work as quoted by the tenderer
1.	A.Sudhakar Reddy, H.No. 2-2-1075/A/3, Bagh Amberpet, Hyderabad	Rs.62285882.42
2.	M.V.V.Satyanarayana, 6-1-136/3M, Mehar Ratna Complex, Balaram Colony, Padmaraonagar, Secunderabad	Rs.62534573.84.

The eligibility criteria for the above mentioned tender (item 2.0 of tender schedule) is that the tenderer should have completed at least one similar single work viz., buildings above G+1 for a minimum value of 35% of advertised tender value of the work in the last 3 financial years i.e., current financial year and three previous financial years. As per the above eligibility criteria only works executed and completed in the current year up to date of tender opening and in the previous financial years is only considered i.e. from 01-04-2004 to 31-07-2007.

It is also averred in para 3 of the counter-affidavit that along with the tender schedule, the petitioner has enclosed the following experience/work done certificate.

Sl. No.	Name of work	Agt.No. & executed value	Date of completion	Remarks
1.	Construction of Residential and non-Residential buildings and internal roads in MANUU Campus under phase-II-A.	Reg/MANUU/Ph-II A/01/2005-06 dt.12.05.05. Agt.value Rs.4,92. Cr. Exc.value Rs.5.85. Cr. Certificate issued by Executive Engineer, Campus Development, MANUU	Work is in progress.	Since work is certified as "Work in Progress" it does not satisfy cl.2.0 of Tender conditions
2.	Construction of Ten Court Building Complex in the premises of District Court at Nizamabad.	Agt.No.56/2005-2006 Dt.18-06-2005. Agt.value Rs.5.17 Cr. Exc.value Rs.3.57 Cr. Certificate issued by Executive Engineer, R&B Division, Nizamabad	30.11.07	-do

3.	Two storied commercial complex in the premises of old civil hospital situated at N.H-9, Suryapet, Nalgonda dist. Under IDSMT scheme	Agt.No.01/2004-05 dt.04-04-2004. Agt.value Rs.2.76 Cr. Exc.value Rs.3.66 Cr. Certificate issued by Executive Engineer, Suryapet Municipality, Suryapet, Nalgonda	30.03.05	The work certified as completed and falls with in the period as per the cl 2.0 of tender conditions and hence discussed further below this table.
4.	C/o Commercial Complex Cellar+Stilt+5 floors) at 9 & 10 East M.J.Road, Hyderabad.	51/SE/HC-II/2002 dt.25.02.02 Agt Value:2.63 Cr.Exe.Value:2.86 Cr. EE/A.P.Housing Board, Central Divn., Hyderabad.	27.03.04	Completion was not in the period specified in the eligibility criteria as per cl 2.0 of tender conditions
5.	C/o 1st, 2nd & 3rd Floors over existing Ground floor of Dental College & Hospital Building in the premises of Osmania General Hospital, Hyderabad.	79/APHMHIDC/2002-03 dt.31.01.03. Agt.Vlue:2.57 Cr. Exe.Value:2.83 Cr. Certificate issued by EE/APHMHIDC DIVN, HYDERABAD	15.12.03	Completion was not in the period specified in the eligibility criteria as per cl 2.0 of tender conditions
6.	C/o Hostel building for BDS students in the premises of Osmania Medical College, Hyderabad.	4/HMHIDC/2001-02 dt.27.09.01 Agt.Value:1.48 Cr.Exe. Value:1.71 Cr. Certificate issued by EE/APHMHIDC DIVN, Hyderabad.	05.08.02	Completion was not in the period specified in the eligibility criteria as per cl 2.0 of tender conditions

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It is further stated that only the work mentioned at item No.3 in the above table falls in the period. As per the eligibility criteria only buildings "above G+1" are similar in nature. The work of "two storied commercial complex in the premises of old Civil Hospital situated at N.H-9, Suryapet, Nalgonda District under IDSMT scheme" is only G+1 and hence did not fall under similar nature of works specified in the eligibility criteria. There was no construction on terrace floor similar to that of first floor. It is further stated that since the petitioner had not satisfied the eligibility criteria specified for the subject tender, the next lowest offer submitted by respondent No.4, Sri M.V.V.Satyanarayana, Secunderabad was taken up for further consideration. As the rates quoted by respondent No.4 are on higher side, it was proposed to

conduct negotiations with him to explore the possibility of reduction in rates, which had been accepted by the competent authority. Accordingly, negotiations are on with respondent No.4. It is further averred that calling for negotiations would arise only when the tenderer satisfies the eligibility criteria. The petitioner did not satisfy the eligibility criteria hence he was not called for negotiations. Hence, no illegality had been committed in calling respondent No.4 for negotiations.

9. In the reply-affidavit filed by the petitioner the substantial stand taken in the affidavit filed in support of the writ petition had been reaffirmed and with regard to the averments made in para 3 of the counter-affidavit, it is averred that the respondents had extracted his experience certificates and there is no dispute with the same. But however, it is stated that the respondents were incorrect in their statement in the counter that the petitioner did not have the eligibility criteria and that he had not constructed buildings above G+1. It is stated that the commentary on CPWD specifications-civil works may be read as answer to the said contention. As per the said specifications 0.5 deals with floor and levels. 0.5 floor and level reads thus:

0.5.1 Buildings.

0.5.1.1 Floor 1 is the lowest floor above the ground level in the building unless otherwise specified in a particular case. The floors above floor 1 shall be numbered in sequence as floor2, floor 3 and so on. The number shall increase upwards.

0.5.1.2 Floor level: For floor1, top level of finished floor shall be the floor level and for all other floors above floor 1, top level of the structural slabs shall be the floor level.

0.5.1.3 Plinth level: Floor 1 level of 1.2 m above the ground level whichever is lower shall be the plinth level.

It is further stated that even as per the eligibility criteria one should have constructed buildings above G+1 viz., two storied commercial complexes. It is further stated that the petitioner had constructed two storied commercial complex in the premises of old civil hospital situated at N.H.9, Suryapet, Nalgonda district under IDSMT scheme. The said construction was above G+1 and is not G+1 only as stated by the respondents.

Further it is stated that since the building which had been constructed by the petitioner is a building which is above G+1, the respondents ought not to have called the other tenderer,

Sri M.V.V.Satyanarayana, only for negotiations. The said action is arbitrary. Certain other additional facts also had been narrated in the reply affidavit.

10. The respective stands taken by the parties already had been referred to supra. The experience certificate in particular had been pointed out by the learned counsel representing the petitioner and the same reads as hereunder-

"EXPERIENCE CERTIFICATE

1. Name of the Department: Office of Municipal Council, Suryapet Municipality, Suryapet, Nalgonda District.

2. Name of the Work: C/o Two storied commercial complex in the premises of old civil hospital situated at old N.H.-9, Suryapet, Nalgonda dist. Under IDSMT scheme.

3. Amount of the estimate: Rs.2,54,82,049/-

4. Name of the agency : Sri A.Sudhkaer Reddy, Engineer & Special Class Civil Contractor.

5. Agreement No & date : 01/2004-2005 dt.04.04.2004

6. Value of contract : Rs.2,76,42,598/-

7. Date of commencement of the work as per agreement: 04.04.2004

8. Date of completion of the work as per agreement : 03.01.2005

9. Actual date of completion : 30.03.2005

10. Value of the work done : Rs.3,66,04,645/-

S.No.	Description of Item	Physical
	Physical (Principal item of work)	2004-2005
1.	E.W.E	2827.85 CUM
2.	E.W.Filling	16859.03 CUM
3.	Antitermite	3883 SQM
4.	PCC	614.99 CUM
5.	VRCC	2400.31 CUM
6.	Steel	295.31 MT
7.	RCM Masonry (50mm thick)	1030.15 SQM
8.	CRS Masonry	620.61 CUM
9.	Brick work	1185.61 CUM
10.	Plastering	30362.33 SQM
11.	Painting	31633.10 SQM
12.	Flooring-tiles	8165.98 SQM
13.	Dadoing tiles	395.55 SQM
	Financial in Rs.	Rs.3,66,04,645/-

Grand Total Rs.3,66,04,645/-

Sd/-
Executive Engineer,
Suryapet Municipality
Suryapet, Nalonda Dist."

11. Further the relevant portion of the material papers at page 68 had been pointed out and the said portion reads as hereunder-

Quantity	Description of the item	APSS No.	Rate in Rs. In figures	Rate in words	Unit in words	Amount in Rs.

	RCC designed mix in M 20 grade concrete using 20mm HBG machine crushed metal including cost and conveyance of all materials, labour charges equipments etc., complete but excluding cost of steel, binding wire and fabrication charges but including centering, machine mixing, vibrating, finishing, curing and placing, or as directed by the Engineer-in-Charge for finished item of work.	108,110, 112, 126,402, 403&129				
187.00 CUM	a) Column Footing		2919.70	Rupees Two thousand Nine hundred nineteen and paisa seventy only	One cubic meter	545983.90
45.00 CUM	b) Pedestals & Columns up to NGL		3181.85	Rupees three thousand one hundred eighty one and paisa eighty five only	One cubic meter	143183.25
74.00 CUM	c) Columns above NGL In ground floor		3181.85	Rupees three thousand one hundred eighty one and paisa eighty five only	One cubic meter	235456.90
63.00 CUM	d) Columns in First Floor		3219.90	Rupees three thousand two hundred nineteen and paisa ninety only	One cubic meter	202853.70
2.00 CUM	e) Columns in terrace floor		3275.40	Rupees three thousand two hundred seventy five and paisa forty only	One cubic meter	6550.80
75.00 CUM	f)plinth beams		3050.25	Rupees three thousand fifty and paisa twenty five only	One cubic meter	228768.75
14.00 CUM	g) Lintels in Ground floor		3050.25	Rupees three thousand fifty and paisa twenty five only	One cubic meter	42703.50

Sd/- Sd/- Sd/-
TENDERER MUNICIPAL ENGINEER COMMISSIONER

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12. The stand taken by respondents 1 to 3 in their counter-affidavit is that the work of two-storied commercial complex in the premises of old Civil Hospital situated at N.H-9, Suryapet, Nalgonda District under IDSMT scheme is only G+1 and hence does not fall under similar nature of works specified in the eligibility criteria. Further it is stated in the counter-affidavit

that there is no construction on terrace floor similar to that of the first floor.

13. On a careful comparative analysis, no doubt distinction drawn by the authorities appears to be a very slender distinction, but the authorities had taken the said decision.

14. Counsel on record made elaborate submissions in relation to the eligibility criteria and also the limitation of the writ Court to interfere in such maters while exercising the power of judicial review under Article 226 of the Constitution of India. Strong reliance was placed on **Master Marine Services (P) Ltd' case (supra)** wherein the apex Court observed at paras 11 to 15 that-

> "11. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in *Tata Cellular v. Union of India*[2]. It was observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down (See para 85 of the Report, SCC para 70).
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> 12. After an exhaustive consideration of a large number of decisions and stand books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94).
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> 13. In *Sterling Computers Ltd. V. M&N Publications Ltd.*[3] It was held as under: (SCC p.458, paras 18-19)
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> "18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the 'decision-making process'……. By way of

judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time.... the courts can certainly examine whether 'decision-making process' was reasonable, rational, nor arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract."

14. In *Raunaq International Ltd v. I.V.R. Construction Ltd*[4] it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.

15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd*[5] and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere."

15. In the light of the specific stand taken in the counter-affidavit filed by respondents 1 to 3, though the drawing line or the distinction, which had been drawn by the authorities, appear to be of slender margin, the writ Court cannot go into these details. The authorities concerned had gone into the eligibility criteria and had taken up a decision and hence, this Court cannot hold that the said decision taken is either arbitrary or illegal and in view of the limitations imposed on a writ Court, in this realm, this Court is not inclined to interfere with the said decision.

16. Accordingly, the writ petition shall stand dismissed. No order as to costs.

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P.S.Narayana,J

Dated: 11-12- 2007

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Note: L.R. copy to be marked.

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[1] (2005) 6 Supreme Court Cases 138
[2] (1994) 6 SCC 651 : AIR 1996 SC 11
[3] (1993) 1 SCC 445 : AIR 1996 SC 51
[4] (1999) 1 SCC 492
[5] (2000) 2 SCC 617